No. 20374

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

REPLY BRIEF FOR THE APPELLANT

JOHN W. DOUGLAS,
Assistant Attorney General,

RICHARD L. McVEIGH,
United States Attorney,

MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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Appellees raise several points which require a short response.

1. Appellees urge that the United States is "estopped" from contending that the judgment entered against Hayes and Whiteley Enterprises was prima facie evidence of the debt of its guarantors, Messrs. Hayes and Whiteley. Appellees attempt to find an estoppel or "waiver" of the issue in the Government's pre-trial memorandum (R. 35a), which states that the Government expects to prove the allegation in the complaint that the judgment remained unpaid in the amount of $30,691.67, plus interest (R. 2).

The district court regarded the issue of burden of proof as being properly raised, and expressly ruled on it, concluding that "under the facts and circumstances of this case plaintiff had the

burden of proving the amount due on the indebtedness guaranteed by the defendants" (R. 34). There can be no question that even were appellees correct in asserting that the pre-trial order did not include the issue, that defect would be cured "de facto," by the district court's explicit decision on the issue. Interstate Plywood Sales Co. v. Interstate Container Corp., 331 F. 2d 449, 452 (C.A. 9); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F. 2d 640, 643 (C.A. 9); Bucky v. Sebo, 208 F. 2d 304, 305 (C.A. 2).

Moreover, appellees contention is insubstantial. Appellees do not suggest that they were misled by, or relied to their detriment upon, the statement in which they purport to find a basis for "estoppel" or "waiver". Appellees have never indicated any interest in attempting to prove payment of the judgment in question; they did not plead payment, and admitted that they had made no payments (R. 5, 10). And appellees hardly would have withheld from the district court any evidence of payment favorable to them, no matter what they thought the Government would prove at trial. Moreover, counsel for the appellees evidently understood at the outset of the trial that this issue was presented, for he objected to the judgment "being binding on these individual defendants who were not parties to that action" (Tr. 5, 12).

Moreover, the pre-trial statement does not admit, in any way, that the Government had the burden of proving the amount due on the judgment (much less that the judgment would not satisfy that initial burden and shift the burden of proof to the appellees).[1/]

1/ The "estoppel" argument confuses this initial burden with the burden of showing payment which pertains after the judgment is introduced in evidence. If the question is asked, "did the United States undertake to show the amount owed?" appellees' contention

(footnote continued on page 3)

At most, it was an indication that the Government would attempt to prove something not required of it. If the burden of showing payment was in fact on the appellees, who devoted their efforts to obstructing all attempts to show the amount due (see Tr. 5-12) the United States was entitled to invoke that burden.[2/] The "estoppel" contention is therefore baseless, as well as being foreclosed by the district court's decision on the point.

2. Raising yet another procedural objection to this clearly meritorious claim, appellees challenge the sufficiency of one of the specifications of error in our main brief (br. 6), which states: "The district court erred in 'finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States." Appellees do not claim any difficulty in understanding the Government's position on this point; evidently the specification adequately served its purpose. However, even were there some harmless technical defect in the specification, we respectfully submit that it may be cured by

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1/ (continued from page 2)
might have a superficial allure. But if the further question is asked, "did the United States admit that the judgment itself would not show the amount due, as a prima facie matter?" appellees contention is seen to be erroneous. Nothing in this Record would permit a conclusion that the latter point was conceded.

2/ Additionally, the statement on which appellees rely was made when the United States thought "that after pre-trial there will be no issues of fact and no necessity for trial" (R. 35a). The issues presented on this appeal arose because appellees objected to the introduction in evidence of the judgment and the certified statement of account; thus appellees are asserting that the Government has waived an issue which had not arisen when the statement on which they rely was made, and which arose only because of appellees' own actions.

amending it to state what already is implicit therein: "The district court erred in 'finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States, because such evidence also was easily accessible to appellees." See Pacific Queen Fisheries v. Symes, 307 F. 2d 700, 705 (C.A. 9).[3/]

3. In fact, there can be no question that such evidence was easily accessible to the appellees. As stated in our main brief (pp. 9-11), appellees merely had to look at the files of the Bankruptcy Court or correspond with the trustee. Most of appellees' argument on this point simply obscures the issue. Thus appellees claim that they were "lulled" into not following the affairs of Hayes and Whiteley Enterprises after bankruptcy, and that they stayed away from the property. But even were this completely true,[4/] it would not mean that evidence of payment on the judgment was peculiarly within the control of the United States. Once appellees were sued, all the information they needed was in the bankruptcy file, which was just as available to them as to the United States.

3/ Inasmuch as the district court gave no reasons for its conclusion that such evidence was chiefly or entirely within the Government's control, it is difficult to be more specific.

4/ Appellees claim that they were led to understand that they would not be held liable on their guaranty by an RFC employee. While not passing directly on this claim, the district court found (R. 32) that "The proof fails to establish that Hugh (sic) Guenther had authority to orally release defendants from the guaranty or that he did so." Appellees do not challenge this finding here.

At trial Mr. Hayes stated that he had personal knowledge of some of the proceedings in Bankruptcy (Tr. 25). Clearly it is not true that appellees "had no means of keeping directly informed of the affairs of the corporations" (Appellees' br. 11).

Appellees assert that (Br. 17) "There is no reason to believe that the bankruptcy file would contain information respecting payment of the judgment in question" and that the trustee would have no reason to keep records because "the corporations were hopelessly insolvent." These assertions are plainly wrong, because the trustee has a statutory duty to "keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of." 11 U.S.C. 75(a)(5), and because as a matter of common sense (and common law, too)[5/] anyone administering an estate of any kind would keep such records. The insolvency of the estate obviously would not change this; trustees in bankruptcy are not appointed to administer solvent enterprises.[6/]

As a practical matter, this judgment could have been paid from two sources: the trustee and the defendants.[7/] Defendants

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5/ See 2 Scott on Trusts §172 (1956).

6/ Were appellees' argument correct, no trustee in bankruptcy would ever need keep records.

7/ Appellees rely on the fact that some small payments on the debt were made by persons other than the trustee, see Answers to Interrogatories (R. 8). But these payments were made before Hayes and Whiteley Enterprises went into bankruptcy (in January 1955, see Exh. E, p. 13). It is difficult to believe that anyone other than appellees or the trustee would make payments after bankruptcy, but no less than preposterous to think that such a third party would do so without notifying either Messrs. Hayes and Whiteley or the trustee.

Appellees also urge that payment might have been made on the debt without their knowledge through summary foreclosure on chattels (Br. 12). If such foreclosure had occurred, however, this too would be revealed by the bankruptcy file, for subsequent to bankruptcy, "the mortgagee may not in any event institute foreclosure proceedings or otherwise take possession of the property without the court's express authorization." 4 Collier on Bankruptcy §70(a)(5 p. 1051; Straton v. New, 283 U.S. 318, 321; Investors Syndicate v. Smith, 105 F. 2d 611, 621 (C.A. 9). But cf. Gins v. Mauser Plumbing Supply Co., 148 F. 2d 974, 979-80 (C.A. 2), indicating that a sale of pledged securities before notice to the trustee might be possible, but would be subject to careful scrutiny thereafter.

admit that they made no payments (R. 5, 10). To find out whether other payments had been made, they merely had to look at the bankruptcy file. Therefore this is not a case where evidence of what payments had been made was "chiefly or entirely" within the control of one party. If a judgment entered against Hayes and Whiteley Enterprises ordinarily would be prima facie evidence of its debt in a subsequent suit against the guarantors, and the burden of proving payment is upon the guarantors, that rule pertains here.

The cases upon which appellees rely in no way support the contrary decision below. In Selma, Rome & Dalton R. Co. v. United States, 139 U.S. 560, 566-68, the Court held that the railroad had the burden of proving that the Confederate Government had not payed the debt owed it by the United States for three reasons: (1) the statute under which the railroad sued so placed the burden, (2) the fact that the Confederate Government had passed legislation for the payment of such debts to claimants who, like the railroad, were loyal to the Confederate cause, raised a presumption that such payment had been made, and (3) the railroad had superior access to the facts, because its books (which it did not attempt to produce), would show payment or non-payment, but the United States had no reasonable way of ascertaining what payments the Confederate Government made to the railroad. By contrast Messrs. Hayes and Whiteley could easily ascertain what payments had been made here.

In Schneider v. Maney, 242 Mo. 36, 145 S.W. 823 (1912), the court held that the creditor had the burden of proving, in a suit

against a surety, how much of three separate judgments against the principal debtor had been paid by five co-sureties, who had been released from their obligations, and remanded the case for a new trial. The court stressed the refusal of the creditor to make known the information within his knowledge.[8/] Explaining Schneider in a later decision, the Missouri Supreme Court said: "this rule applies particularly to cases of ambiguity, concealment, or evasion .... The peculiar facts in that case justified its application." Emory v. Emory, 53 S.W. 2d 908, 913 (Mo. 1932). The rule may not be routinely invoked to defeat the settled principle that "ordinarily payment is an affirmative plea." Haycraft v. Haycraft, 154 S.W. 2d 617, 622 (Mo. App. 1941).

This case presents a situation opposite to that in Schneider. Here the United States has willingly divulged all information in its possession respecting the payment of this judgment, even though appellees could have obtained this information elsewhere without difficulty. Appellees, on the other hand, while claiming that knowledge of payment was exclusively within the Government's control,

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8/ Both Selma, Rome & Dalton R. Co. v. United States, supra, and Schneider v. Maney also were decisions rendered in a day when no effective discovery procedures existed, and attempts to discover simple information were sometimes denied as "fishing expeditions." Here, however, appellees have taken advantage of the Federal Rules of Civil Procedure to receive all the information they could need. The application of the "peculiar knowledge" doctrine to shift the ordinary burdenof proof should be sparing in a day when modern discovery procedures require the sharing of information. Tortora v. General Motors Corp., 373 Mich. 563, 130 N.W. 2d 21, 24 (1964). Appellees appear to misunderstand our position on this point, when they assert (Br. 17-18) that the United States is attempting to use discovery to shift the burden of proof. It is the appellees who seek to shift the usual burden of proving payment from themselves by invoking the "peculiar knowledge" doctrine. We urge that the existence of discovery negates the need to change the ordinary burden of proof.

have vigorously opposed every attempt to place the relevant information into evidence (Tr. 5-12). Appellees run afoul of the principle that:

> The party claiming that the burden should be shifted because of the unusual circumstances of the other party having knowledge or control of the evidence must be particularly diligent to place no obstacle in the path of the party so burdened. [31A C.J.S. Evidence § 113; Cf. In re Petition of Boat Demand, Inc., 174 F. Supp. 668, 673 (D. Mass.)]

The "superior knowledge" doctrine relied upon by the district court is thus for several reasons wholly inapplicable to this case.[9/]

4. Appellees offer little argument on the question of whether a judgment rendered against a principal is prima facie evidence of his debt in a suit against a surety. It should be so considered in general, and especially in this case. When a trustee in bankruptcy, charged with the duty to "object to the allowance of such claims as may be improper," 11 U.S.C. 75(a)(8), admits the propriety

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9/ Other cases relied upon by appellees are even less pertinent than the ones discussed above. The purported quotation from Peterson v. Wilbanks, 163 Ga. 742, 137 S.E. 69 (1927), appearing in appellees' brief (p. 17) cannot be found in the reports contained in our library after several careful readings of the case. In fact, Georgia instead follows the majority rule that "a decree or judgment which binds the principal is prima facie evidence against the surety." Bradwell v. Spencer, 16 Ga. 578, 581-82 (1855).

State ex rel. Leary v. Hughes, 185 So. 69 (La. App. 1938), did not involve a suit against a surety upon a judgment rendered against his principal. Rather, it was held that under the circumstances of that case, a creditor who held a judgment against the debtor which was known to be at least partially satisfied, had the burden of showing how much had been paid, in a contest with another creditor. The court noted that there were no court records available to show how much had been paid, and that the creditor on whom the burden was placed was seemingly the only person who possessed the requisite information.

of the claim, surely this is prima evidence of the debt against a person who has "unconditionally" guaranteed "the due and punctual payment when due, whether by acceleration or otherwise ... of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor" (R. 4).

We note that appellees do not suggest that there would have been any defense to the foreclosure suit. It is clear that the judgment entered here should thus be considered prima facie evidence against these guarantors, regardless of whether or not this Court would choose to follow "the great majority" of other courts holding that a default judgment entered against the principal is in general prima facie evidence against the sureties, see Commonwealth to the Use of Ulshofer v. Turner, 340 Pa. 468, 17 A. 2d 352, 354 (1941). Moreover, for the reasons stated in our main brief (pp. 14-15), which appellees do not undertake to answer, the majority rule is not just "stereotyped authority" (Appellees br. 24), and should be followed, if this Court considers that a choice is necessary.

Finally, appellees argue that the judgment against Hayes and Whiteley Enterprises is not prima facie evidence of their debt because the complaint (R. 1-3) does not seek recovery of the full amount of the judgment. Such a contention was well answered in Machctinger v. Grenzebach, 282 S.W. 2d 200 (Mo. App. 1955). There plaintiff produced invoices totalling $334, of which $80 worth were cancelled. The defendant urged that because partial payment was thus shown, plaintiff had the burden of proving the amount due. The court answered (282 S.W. 2d at 202):

> A plaintiff is under no duty to allege non-payment of the obligation sued upon, and a defendant must affirmatively plead payment ..... Even if defendant did

> affirmatively plead payment, he would have the burden of proving it; and it would not be necessary for plaintiffs, even if they had alleged non-payment, to prove it.... Of course, plaintiff's evidence that $80 had been paid on the account constituted a binding admission pro tanto, but it did not shift the burden of proof from defendant to plaintiffs as to how much had been paid.

Similarly, the fact that the United States sought recovery of less than the full amount of the judgment does not change the burden of proof here. Instead the Government was entitled to recovery any amount not in excess of the amount of the judgment, unless appellees produced evidence of payment to negate the amount claimed. It would be illogical, and productive of fictitious pleading, to hold that although the defendant has the burden of proving payment when the complaint asks recovery of the full amount of the judgment, the plaintiff is placed in a worse position, and must carry the burden of proof, when he asks recovery of less money.

Of course, appellees know why recovery of $30,691.67 plus interest was sought instead of the face amount of the judgment, for they are just as familiar as the Government with the Marshal's Return on Execution, showing the judgment to be unpaid in the amount of $30,691.67 (Exh. D). But it also cannot avail appellees if everyone pretends that this court record does not exist.[10/] This is so, because appellees cannot properly say that it is known that the judgment was partially paid, when, as a result of

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10/ Appellees correctly state that the Return on Execution was only marked for identification and not placed into evidence. However, they were free to offer it as evidence, and the district court could have taken judicial notice of it. Although the district court apparently did not take notice of the bankruptcy file, as requested (Tr. 46-48), it surely should have noticed this single document (if it did not actually do so), and there is no reason why this Court could not take notice of it.

their successful efforts to exclude evidence of payment, there is no "evidence" of such partial payment in the record, but only the prayer in the complaint asking recovery of $30,691.67, plus interest. Although this prayer for relief limits the amount recoverable, it does not shift the burden from the appellees.

CONCLUSION

For the reasons stated above, and in our main brief, we respectfully submit that the judgment of the district court should be reversed, with instructions to enter judgment in favor of the United States in the amount of $30,691.67, plus accrued interest.

Respectfully submitted,

JOHN W. DOUGLAS,
Assistant Attorney General,

RICHARD L. McVEIGH,
United States Attorney,

Walter H. Fleischer

MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with these rules.

Walter H Fleischer

WALTER H. FLEISCHER,
Attorney,
Department of Justice,
Washington, D. C. 20530.